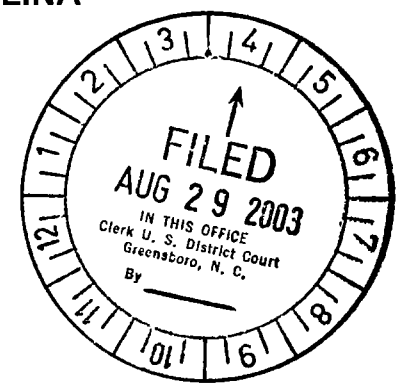
34

D/KW

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



LEON W. MCMILLIAN,	)	
	)	
	)	
Plaintiff,	)	
v.	)	1:02CV56
	)	
GUILFORD COUNTY,	)	
	)	
	)	
Defendant.	)	

RECOMMENDATION BY UNITED STATES MAGISTRATE JUDGE

This matter is before the court on Defendant's motion for summary judgment [docket #31]. Plaintiff has filed a responsive pleading and this matter is ripe for disposition. Since there has been no consent, I must deal with the motion by way of a recommendation. For the reasons stated herein, I recommend that the court grant Defendant's motion for summary judgment.

Procedural History

Plaintiff, a black male, worked at the Guilford County Juvenile Detention Center as a juvenile counselor technician for twenty-four years until he was suspended on May 8, 2001, and then fired on July 23, 2001. Plaintiff was forty-nine years old when he was fired. On January 28, 2002, Plaintiff filed a Complaint against Guilford County, the Guilford County Juvenile Detention Center, and the Center's Director, Jeffrey McInnis. Plaintiff alleged claims for age discrimination

pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630 et seq. ("ADEA"), race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), tortious interference with contract, and intentional and/or negligent infliction of emotional distress. On March 18, 2002, Defendants filed a motion to dismiss all claims. This court subsequently dismissed Plaintiff's claims for race discrimination, tortious interference with contract, and intentional and/or negligent infliction of emotional distress. The court also dismissed all claims as to all Defendants except for Guilford County. Thus, the only remaining claim in this case is Plaintiff's claim for age discrimination against Defendant Guilford County. Defendant Guilford County has now filed a motion for summary judgment as to that claim.

Discussion–Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Zahodnick v. International Bus. Machs. Corp.*, 135 F.3d 911, 913 (4th Cir. 1997). The party seeking summary judgment bears the burden of initially coming forward and demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party must then affirmatively demonstrate that there is a genuine issue of material fact which requires trial. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). There is no issue for trial unless

there is sufficient evidence favoring the non-moving party for a fact-finder to return a verdict for that party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986); *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 817 (4th Cir. 1995). Thus, the moving party can bear his burden either by presenting affirmative evidence or by demonstrating that the non-moving party's evidence is insufficient to establish his claim. *Celotex Corp.*, 477 U.S. at 331 (Brennan, J., dissenting). When making the summary judgment determination the court must view the evidence, and all justifiable inferences from the evidence, in the light most favorable to the non-moving party. *Zahodnick*, 135 F.3d at 913.

Plaintiff's ADEA Claim

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A plaintiff can prove an ADEA violation in one of two ways. *EEOC v. Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992). He can offer direct and circumstantial evidence that he would not have been discharged but for his age, or he can use the *McDonnell Douglas* scheme of shifting burdens. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (assuming that the *McDonnell Douglas* framework used in Title VII cases also applies in ADEA cases); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a prima facie case of age discrimination under the *McDonnell*

Douglas framework, a plaintiff must show by a preponderance of the evidence that: (1) he was within the protected age group (at least forty); (2) he suffered an adverse employment action; (3) at the time of the adverse employment action he was performing his job at a level that met his employer's legitimate expectations; and (4) the adverse employment action took place under conditions establishing an inference of discrimination.[1] *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996).

Once a plaintiff establishes a prima facie case, the burden then shifts to the defendant to demonstrate a legitimate, nondiscriminatory reason for the challenged action. *Id.* Nevertheless, this burden "is one of production, not persuasion." *Id.* If the employer demonstrates a legitimate, nondiscriminatory reason, the presumption of unlawful discrimination created by the prima facie case "drops out of the picture," and the burden shifts back to the employee to show that the given reason was merely a pretext for discrimination and that age was the more likely reason for his dismissal. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The responsibility of proving that "the protected trait . . . actually motivated the employer's decision" remains with the plaintiff at all times. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Thus,

---

[1] An inference of discrimination can arise, for example, by showing that the employee was fired and replaced by someone "substantially younger" but not necessarily outside the protected class, *O'Connor*, 517 U.S. at 311-12, or, if the employee was fired but not replaced, by showing that the employer did not treat the employee's age neutrally when making the decision to fire him. *Clay Printing Co.*, 955 F.2d at 941.

it is not enough for a plaintiff merely to raise an inference of discrimination. Rather, the plaintiff bears the ultimate burden of proving that the decision was made not on any proffered grounds but instead on the basis of impermissible discriminatory grounds. *Reeves,* 530 U.S. at 143.

Finally, although the *McDonnell Douglas* evidentiary scheme involves shifting burdens, discrimination cases may nevertheless be evaluated under established summary judgment principles. *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310 (4th Cir. 1993). Thus, to overcome a motion for summary judgment in a discrimination case, a plaintiff must provide direct or circumstantial evidence "of sufficient probative force" to show a genuine issue of material fact exists as to whether the adverse employment decision was based on discriminatory grounds. *Goldberg*, 836 F.2d at 848. A plaintiff can fail to meet his burden not only by failing to establish a prima facie case, but also by failing to show a genuine factual dispute over the employer's legitimate, nondiscriminatory explanation. *Mitchell*, 12 F.3d at 1315. Here, Defendant has moved for summary judgment on the grounds that Plaintiff has neither presented sufficient evidence to establish a prima facie case of age discrimination nor presented evidence to show that Defendant's legitimate, non-discriminatory reason for firing Plaintiff was a pretext. I agree on both points.

First, I note that Plaintiff has shown no direct evidence of age discrimination. Therefore, Plaintiff must proceed under the four-part *McDonnell Douglas* framework. Here, Plaintiff alleged that he was forty-nine years old when he was fired.

Accordingly, he has met the first two parts of the *McDonnell Douglas* prima facie claim. Plaintiff fails, however, to show that a genuine issue of fact exists as to the third part because Defendant has produced ample evidence showing that Plaintiff was not meeting Defendant's legitimate expectations when he was fired. Defendant points out, for example, that Plaintiff had received eight reprimands for unsatisfactory performance during a four-year period before Plaintiff was fired. The reprimands included the following:

Aug. 7, 1997:	Sleeping during night shift guard duty.
Aug. 26, 1997:	Sleeping during night shift guard duty.
Aug. 29, 1997:	Failing to report for work.
Dec. 17, 1998:	Unsatisfactory performance and failure to follow directives.
May 25, 1999:	Failing to make required visual checks of juvenile cells.
Feb. 3, 2000:	Insubordination and failure to follow directives.
Apr. 3, 2000:	Negligent performance of duties and failure to report a fight.
May 7, 2001:	Inappropriate behavior in discussing staff procedures used to restore order.

Def.'s Exs. 15, 16, 17, 18, and 19. According to Defendant, Plaintiff's unsatisfactory performance leading to his discharge culminated on May 8, 2001, when two inmates tried to escape from the Detention Center while under Plaintiff's supervision. *See* Def.'s Exs. 5-10. Defendant produced evidence that three years before the attempted escape, the Detention Center had enacted a "zero tolerance" policy regarding juvenile escapes and escape attempts. The policy states that

> if staff permits [attempted escapes and escapes] to occur, due to intentional and/or willful negligence and/or a disregard for department protocol, a recommendation for termination will ensue without delay.

Def.'s Ex. 4. The policy was conveyed to all Detention Center employees, and

Plaintiff acknowledges that the policy was read aloud to him. Pl.'s Dep. at 43. The evidence also tends to show that one day before the attempted escape a supervisor reprimanded Plaintiff for sharing inappropriate information with inmates regarding the level of security in the Detention Center and various ways staff might respond to an escape attempt. Def.'s Ex. 12. According to Defendant, as of the escape attempt Plaintiff already knew that "his job was at stake" because of the previous reprimands. Defendant further contends that Plaintiff admitted on May 8, 2001, that "he dropped the ball during his supervision and was negligent for failing to report vital information to [the] Operations Manager and Shift Supervisor" after the escape attempt. Def.'s Exs. 5, 8.

After the attempted escape, the Detention Center's director Jeffrey McInnis confronted Plaintiff and demanded that Plaintiff resign or be fired. Plaintiff refused to resign, and McInnis suspended him and recommended his termination on the grounds that Plaintiff (1) had been negligent in the performance of his duties, demonstrated unacceptable performance of duty, and willfully disregarded [Guilford] County policies; (2) engaged in conduct unbecoming an employee by providing inmates with security measures the day before the attempted escape; (3) committed inexcusable neglect of duty by putting the staff and the public in jeopardy; and (4) intentionally disrupted the workplace. Def.'s Exs. 10, 11. A panel reviewing McInnis's recommendation found no evidence of age discrimination and further recommended Plaintiff's termination. On July 16, 2001, Plaintiff appeared at a

scheduled hearing, after which he was fired for violating county policies and procedures.

In opposing summary judgment, Plaintiff does not dispute Defendant's evidence regarding the written warnings Plaintiff received before he was fired or that Defendant had instituted a "no-tolerance" policy regarding escapes and escape attempts. Plaintiff argues only that the attempted escape on May 8, 2001, was not his fault and that other employees at the Detention Center had not been fired when similar escape attempts had occurred under their supervision. Plaintiff has produced no evidence, however, to support either of these blanket assertions. In sum, Plaintiff fails to raise a genuine issue of fact as to whether he was performing according to his employer's legitimate expectations when he was fired. Indeed, the evidence in the record indicates that Plaintiff was not performing according to his employer's legitimate expectations when he was fired, as demonstrated by numerous written reprimands over a four-year period, the reprimand the day before the escape attempt, and Defendant's conclusion, supported by numerous interviews and reports of other Center employees, that Plaintiff had acted negligently in supervising the inmates on the day of the escape attempt and that his negligent supervision had contributed to the escape attempt. Therefore, Plaintiff cannot meet the prima facie case sufficient to survive summary judgment.

Even if Plaintiff could establish a prima facie case of age discrimination, he would still not prevail because he has not raised a genuine issue of material fact as

to whether Defendant's stated reason for firing Plaintiff was pretextual. As noted above, Defendant's stated reason for firing Plaintiff–poor job performance culminating in the May 8, 2001, escape attempt–is amply supported by the record. To support his theory that Defendant's stated reason for firing him was pretextual, Plaintiff offered only the following explanations:

> It's pretty obvious if you take a look at–a look at the staff they got now. When they got rid of me . . . they hired 14 more people. Fourteen–the largest number they've ever hired. They ain't never hired that many since I've been there–at one time. Any nobody–nobody was over 35. And this is the type–This is what he wanted. He wanted young folks there. He didn't want old people there. He wanted young people that he could train–and were young and just starting their careers that was college educated. And he got that.
>
> . . . .
>
> Well, because nobody else was fired. Nobody has ever been fired for an attempted escape and it's . . . inconceivable that they would even fire somebody for an attempted escape.
>
> . . . .
>
> Because I was the oldest man there. I was the oldest man there. I had the longest term there, and [McInnis] went so far as to strike the word 'seniority' from our vocabulary, so to speak. He said, 'There's no more senior people in the building.' I said 'What do you mean?' [He said] 'From now on, you're seasoned employees.' He wanted nobody to be senior above him, which is just totally crass, I think.

Pl.'s Dep. at 129-30, 133. In offering these explanations, Plaintiff has not raised a genuine issue of fact as to whether Defendant's stated reason for firing him was pretextual. First, Plaintiff's naked opinion, without more, that Director McInnis wanted only young people working at the Detention Center is not sufficient to show that Defendant's stated reason for firing Plaintiff was pretextual. *See Goldberg*, 836 F.2d at 848. Furthermore, even if Dr. McInnis's instructions to the older staff to refer

to themselves as "seasoned" rather than "senior" employees could somehow be construed as inappropriate age-related comments, it is well established that "stray remarks, unrelated to the decision-making process are insufficient to establish a claim of discrimination." *See Clay Printing Co.*, 955 F.2d at 942-43 (stating that a plaintiff must show a nexus between age-related comments and the adverse employment decision). In sum, Plaintiff has offered no evidence to raise a genuine issue of fact as to whether Defendant discriminated against him because of his age. Therefore, summary judgment is appropriate as to Plaintiff's age discrimination claim.

FOR THE FOREGOING REASONS, it is recommended that Defendant's motion for summary judgment be **GRANTED** and that the case be **DISMISSED**.

WALLACE W. DIXON
United States Magistrate Judge

Durham, NC
August 28, 2003.